# Fisar bin Hj Abdullah v Malayan Banking Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-02–2489–09 OF 2011
ABDUL WAHAB PATAIL, BALIA YUSOF AND TENGKU MAIMUN JJCA
5 AUGUST 2014

*Banking — Banks and banking business — Guarantees — Guarantor — Claim for breach of payment of loan facilities against guarantor — Borrower failed, refused and/or neglected to maintain accounts satisfactorily — Facilities secured by negative pledge and debenture — Bank recalled facilities by solicitor's notice demand — Whether bank had proved amount claimed — Whether sale of units of properties by liquidator proper and valid — Whether bank mitigated losses — Whether there was valid and proper demand made on guarantor*

The appellant appealed against the decision of the High Court in favour of a claim by the respondent against the appellant as a guarantor to an overdraft and term loan facilities for the sum of RM1,095,472.79 and RM4,428,831.34, respectively. The facilities were offered to Emporium Jaya (Kuala Lipis) Sdn Bhd ('the borrower') and the appellant was one of the directors who gave guarantees for the facilities. The facilities were also secured by a negative pledge and a debenture executed on the same date. The respondent recalled the said facilities by a solicitor's notice demand to the borrower on the grounds that the borrower had failed, refused and/or neglected to maintain the accounts satisfactorily. A search with Jabatan Insolvensi obtained showed that the borrower was wound up by an order and a further official search revealed that the other directors were adjudged bankrupt with receiving and adjudication orders. The respondent had not taken any action on the debenture, and of the 32 properties assigned to the respondent, 25 units had been sold by the liquidator. The issues raised in the appeal were whether the respondent had proved the amount claimed; whether the sale of the 25 units of the said properties by the liquidator were proper and valid; whether the respondent failed to mitigate its losses; whether there was a valid and proper demand made on the appellant.

**Held**, allowing the appeal and setting aside the order of the High Court with costs:

(1) The appellant had clearly challenged and demonstrated that there was uncertainty as to what was the correct amount still owed by the borrower and therefore there was uncertainty that the amount sought in the notice of demand was the correct amount (see para 30).

(2) Although the right to disposal was a right *in rem* in the hands of the respondent, it did not mean the respondent could dispose of it directly only. The evidence showed that the respondent was credited with the redemption amount. In accepting to release its *in rem* security for disposal by the liquidator, the respondent had willingly allowed the excess, if any, over the redemption amount to be retained by the liquidator to satisfy other creditors. The respondent was at liberty to be generous with its security but it was inequitable where that generosity affects the rights of the guarantor, where the respondent's generosity to the liquidator resulted in the guarantor being exposed to a claim from the respondent for an amount greater than if the respondent had utilised the *in rem* security entirely to reduce the amount owed by the borrower to the respondent (see para 31).

(3) Civil litigation provides for a statement of claim to give notice of the cause of action and the facts relied upon and a statement of defence as to the facts disputed. Where a fact was disputed in the statement of defence, it was notice that the fact was disputed. Only then would disclosure of the evidence relied arise if required by the statement 'put to strict proof' and for the evidence produced by answers in interrogatories or production if discovery was sought. If the checking and verification by this process satisfied the parties as to what the correct facts were, and come up with agreed facts thereon, there is no necessity for trial upon that disputed fact (see para 37).

(4) If the parties remained not satisfied as to what the correct facts are, then only would it arise for the court to examine the evidence produced through the process of examination and cross-examination, and hear the reasons and explanation by the parties before making its findings on the facts and reaching a decision on the litigation before it. It need not be said that if a fact was not pleaded, the other party did not have the opportunity to check and verify it, and that being so, that fact was unsafe to be admitted into evidence and taken into consideration unless the other party did not object to it and allowed it into evidence (see para 37).

**[Bahasa Malaysia summary**

Perayu merayu terhadap keputusan Mahkamah Tinggi yang berpihak kepada tuntutan yang dibuat oleh responden terhadap perayu sebagai penjamin kepada suatu overdraf dan terma kemudahan pinjaman untuk jumlah sebanyak RM1,095,472.79 dan RM4,428,813.34, masing-masing. Kemudahan-kemudahan itu ditawarkan kepada Emporium Jaya (Kuala Lipis) Sdn Bhd ('peminjam') dan perayu adalah salah satu daripada pengarah yang memberikan jaminan terhadap kemudahan-kemudahan itu. Kemudahan itu juga dijamin oleh sumpah negatif dan suatu debentur dilaksanakan pada tarikh yang sama. Responden menarik balik kemudahan itu melalui satu notis tuntutan daripada peguamcara kepada peminjam atas alasan peminjam telah

gagal, menolak dan/atau mengabaikan untuk menyimpan akaun dengan memuaskan. Carian dengan Jabatan Insolvensi yang diperolehi menunjukkan bahawa peminjam telah digulungkan oleh suatu perintah dan carian rasmi lagi mendedahkan bahawa pengarah lain telah diisytiharkan muflis dengan perintah penerimaan dan penghukuman. Responden tidak mengambil apa-apa tindakan ke atas debentur itu, dan daripada 32 hartanah yang diberikan kepada responden, 25 unit telah dijual oleh pelikuidasi. Isu-isu yang dibangkitkan dalam rayuan itu ialah sama ada responden telah membuktikan jumlah yang dituntut; sama ada penjualan 25 unit hartanah-hartanah itu oleh pelikuidasi adalah betul dan sah; sama ada responden gagal untuk mengurangkan kerugian; sama ada terdapat permintaan yang sah dan wajar dibuat kepada perayu.

**Diputuskan**, membenarkan rayuan dan mengetepikan perintah Mahkamah Tinggi dengan kos:

(1) Perayu dengan nyata telah mencabar dan menunjukkan bahawa terdapat keraguan terhadap jumlah sebenar yang masih terhutang oleh peminjam dan oleh itu terdapat keraguan bahawa amaun yang dipohon dalam notis tuntutan adalah amaun yang betul (lihat perenggan 30).

(2) Walaupun hak untuk pelupusan adalah hak *in rem* di tangan responden, ia tidak bermakna responden boleh melupuskannya secara langsung sahaja. Bukti-bukti yang menunjukkan bahawa responden telah dikreditkan dengan jumlah penebusan. Dalam menerima untuk melepaskan cagaran *in rem* untuk pelupusan oleh pelikuidasi, responden telah rela dibenarkan lebihan itu, jika ada, ke atas jumlah penebusan yang ditahan oleh pelikuidasi itu untuk memuaskan pemiutang lain. Responden adalah bebas untuk bermurah hati dengan cagaran, tetapi ia adalah tidak saksama di mana kemurahan hati yang memberi kesan hak penjamin, di mana kemurahan hati responden kepada pelikuidasi menyebabkan penjamin terdedah kepada tuntutan daripada responden untuk jumlah yang lebih besar daripadanya jika responden telah menggunakan cagaran *in rem* sepenuhnya untuk mengurangkan jumlah yang terhutang oleh peminjam kepada responden (lihat perenggan 31).

(3) Tindakan undang-undang sivil memperuntukkan suatu penyataan tuntutan untuk memberikan notis mengenai kausa tindakan dan mengandungi fakta dan penyataan pembelaan tentang fakta yang dipertikaikan. Jika fakta yang dipertikaikan dalam kenyataan pembelaan, ia adalah nyata bahawa fakta dipertikaikan. Hanya selepas itu pendedahan keterangan bergantung apabila dikehendaki oleh kenyataan 'put to strict proof' yang dihasilkan oleh jawapan secara interogatori atau pengeluaran jika penemuan telah diperolehi. Jika semakan dan pengesahan oleh proses ini memuaskan pihak-pihak tentang fakta yang betul, dan datang dengan fakta dipersetujui atasnya, tidak ada keperluan

untuk perbicaraan atas fakta dipertikaikan (lihat perenggan 37).

(4) Jika pihak-pihak yang masih tidak berpuas hati tentang fakta yang betul, maka ia hanya akan ditimbulkan bagi mahkamah untuk memeriksa keterangan yang dihasilkan melalui proses pemeriksaan dan pemeriksaan balas, dan mendengar alasan dan penjelasan oleh pihak-pihak sebelum membuat penemuannya kepada fakta dan mencapai keputusan mengenai tindakan undang-undang di hadapannya. Ia tidak perlu dikatakan bahawa jika fakta yang tidak diplidkan, pihak yang satu lagi tidak mempunyai peluang untuk menyemak dan mengesahkannya, dan yang begitu, bahawa fakta adalah tidak selamat untuk diterima masuk ke dalam keterangan dan diambil kira melainkan jika pihak satu lagi tidak membantah kepadanya dan membenarkan menjadi bukti (lihat perenggan 37).]

**Notes**

For cases on guarantee, see 1(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 2551–2552.

**Cases referred to**

*Alliedbank (Malaysia) Bhd v Yau Jiok Hua* [1998] 6 MLJ 1; [1998] 2 CLJ 33, HC (not folld)
*International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86, FC (refd)
*Kabatasan Timber Extraction Co v Chong Fah Shing* [1969] 2 MLJ 6, FC (refd)
*Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* (1987) 2 MLJ 610, SC (refd)
*Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; [1995] 1 CLJ 609, CA (refd)
*Public Bank Bhd v Rasatulin Holdings Sdn Bhd & Ors* [1989] 1 MLJ 47, HC (not folld)

**Legislation referred to**

Contracts Act 1950 s 94

**Appeal from:** Suit No 22–19 of 2007 (High Court, Kuantan)

*Ong Siew Wan (Toh & Co) for the appellant.*
*Roszimah Jamlus (Naizah Hanafi with her) (Kam Woon Wah & Co) for the respondent.*

**Abdul Wahab Patail JCA:**

**[1]** The appellant Fisar bin Hj Abdullah appealed against the decision of the High Court made on 19 August 2011 in favour of a claim by the respondent Malayan Banking Bhd against the appellant as a guarantor to an overdraft and

term loan facilities for the sum of RM1,095,472.79 and RM4,428,831.34 respectively as at 31 October 2006.

**[2]** The appeal to this court was allowed and the order of the High Court was set aside with costs in the sum of RM10,000. Our reasons are as follows.

**[3]** The facilities were offered to Emporium Jaya (Kuala Lipis) Sdn Bhd ('the borrower') on 1 August 1996. A loan agreement cum assignment was executed on 2 December 1996. The appellant was one of the directors who gave guarantees for the facilities. The facilities were also secured by a negative pledge and a debenture executed on the same date.

**[4]** As stated in the written submission for the appellant, the respondent recalled the said facilities by a solicitor's notice of demand dated 29 June 2001 to the borrower on the grounds that the borrower had failed, refused and/or neglected to maintain the accounts satisfactorily.

**[5]** A notice of demand dated 29 June 2001 was issued at the same time to the directors, Chong Hock Yuen @ Chong Ying Keong, Wong Lap Weng, Chong Yin Kiam and Fisar bin Hj Abdullah:

> In the circumstances, we are instructed by our client that the aforementioned loan facilities are now forthwith RECALLED and to demand from you as guarantors, as we hereby do, that you are to pay to our client the outstanding sum of RM3,237,990.08 Term Loan and RM1,007,677.36 of Overdraft together with interest thereon and the further sum of RM157.50 being the costs of issuing this notice, ALL within FOURTEEN (14) DAYS from the date hereof, failing which we have firm instructions to institute legal proceedings against you for the recovery of the same without any further reference to you.
>
> TAKE FURTHER NOTICE that should legal proceedings be instituted as aforesaid, you shall be liable for the costs of such proceedings.

**[6]** There was no response to the demand. A search with Jabatan Insolvensi obtained the response dated 29 November 2006 that the borrower was wound up by an order made on 13 May 2003. An official search with Jabatan Insolvensi provided the information on 9 August 2007 that the other directors were adjudged bankrupt with receiving and adjudication orders made as follows:

(a) Chong Yin Kiam — 11 May 2005;

(b) Chong Hock Yuen @ Chong Ying Keong — 25 August 2004; and

(c) Wong Lap Weng — 22 December 2004.

**[7]** The respondent filed a claim for the following:

(a) overdraft facility as at 31 October 2006: RM1,095,472.79;

(b) interest on RM1,095,472.79 at the rate of 2.75%pa above the respondent's base lending rate on daily rests basis calculated from 1 November 2006 till the date of full realisation;

(c) fixed loan as at 31 October 2006: RM4,428,831.34;

(d) interest on RM4,428,831.34 at the rate of 2.50%pa above the respondent's base lending rate on monthly rests basis calculated from 1 November 2006 till the date of full realisation;

(e) costs on solicitors-client basis;

(f) costs of the action; and

(g) further and other relief.

**[8]** It is not disputed by the respondent that it has not taken any action on the debenture, and of the 32 properties assigned to the respondent, 25 units had been sold by the liquidator.

**[9]** The issues raised in the appeal before us were summarised by counsel for the respondent as follows:

(a) whether the respondent has proved the amount claimed?

(b) whether the sale of the 25 units of the said properties by the liquidator were proper and valid?

(c) whether the respondent has failed to mitigate its losses? and

(d) whether there was a valid and proper demand made on the appellant?

**[10]** The appellant set-out its version of the issues as follows:

(a) disputing the amount claimed (see para 3 of the defence at p 36 of the RR);

(b) the respondent/plaintiff in breach of duty of care in disposing the 'charged' properties and/or failure to mitigate its loss (see para 4 and 4.1 of the defence at pp 36–37 of the RR);

(c) disputing the validity and service of the letter of demand; and

(d) no prior notice given to the principal borrower.

**[11]** We do not propose to address the issues individually but to take them as a whole as far as practicable.

A THE EVIDENCE

**[12]** The record shows that there was a notice of demand dated 29 June 2001 for RM1,007,677.36 for overdraft and RM3,237,990.08 for term loan calculated as at 31 May 2001. It also shows there was a second notice of B demand dated 8 November 2006 for RM1,095,472.79 for overdraft and RM4,428,831.34 for term loan calculated as at 31 October 2006. The claim was made upon the basis of the second notice of demand.

C **[13]** In the proceedings, the appellant as the defendant had disputed the amount. It was submitted for the respondent that the appellant had stated during re-examination that he did not make payment upon receipt of the notice of demand from the respondent's solicitors because he was of the view that the securities provided by the borrower to the respondent would be D sufficient to cover the amount outstanding.

**[14]** It was submitted for the respondent that it has fulfilled the requirement stated in the case of *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86, and has proved the claim on its statement of claim upon a balance of E probabilities based upon the document produced and the evidence given by 'PW1', 'DW1' and the appellant at the trial.

**[15]** Examination of the record of appeal shows that PW1 Hoh Teck Meng, the Accounts Manager of Maybank, in cross-examination that commenced at F RR *Bah* B *Jld* 2(1):50, replied in QA 15–16 that there were no other facilities granted other than these two facilities granted and that he was sure (QA 18). But when put to him (QA 19), there was another facility of about RM540,000 by the same bank to the borrower, his answer was, he was not aware, and when G clarification was sought (QA 20) counsel for the respondent said:

> En Basil: The Plaintiff's bank is pursuing this action against the two facilities. Any other facility is not relevant to this suit. I do not see how it is relevant in any way. The Plaintiff bank has elected to pursue this 2 facilities and the guarantee is for this 2 facilities.

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**[16]** When the question of relevancy of other loans was put by the court to counsel for the appellant, he explained:

> En Ong: There is so many things because we are going to show whether the I bank has breach the judiciary duty to the customer and to the guarantor and there is another loan. They liaised the property. They gave a very low redemption amount and the property is worth more than 50% of the market value. And they have not done their part. And have not mitigate their loss and just allowed the property to be sold at

a very low price. So, it's definitely in the facility and in the loan cum assignment there is a consolidation of account that they have to exercise.

**[17]** When cross-examination continued, in answer to the question 'Can you answer that you don't know or there is no other facility granted by the bank?', his answer was not that there was no other loan facility granted but 'I am not aware of it.'

**[18]** Further cross-examination showed that there was uncertainty as to how many units were there and were assigned (QA 28–35), whether 31, 27, or 32.

**[19]** From the foregoing, it was demonstrated that there was uncertainty as to the correctness of the amount claimed arising from uncertainty as to the number of units assigned and therefore could be sold towards satisfaction of the outstanding sum owed. There was also uncertainty for the witness PW1 himself when he did not say categorically these were the only two facilities. It is obvious that a claim for the amount due from a borrower is for the nett amount. If there are other accounts in which he has a credit, that would reduce the amount he owes the respondent. QA 151–165 demonstrated the existence of a second facility and two properties charged, but PW1 knew nothing of these, and did not know what happened (QA 164). He was not aware the borrower asked for a redemption sum of RM500,000 for that facility.

**[20]** Further scrutiny of the cross-examination of PW1 shows that (QA 46ff), he had no comment to the following (QA 58):

QA 58 S: Please refer to page 4. Can you tell the Court how this the top sentence (last sentence) 'particular whereof has been rendered to you and are within your knowledge'. You said the bank never communicate, never give anything to the guarantor. How this particular has been rendered to them and within the guarantor's knowledge?

J: Please repeat your question.

QA 59 S: Do you understand the sentence particular of all the amount, the term loan, the OD and the letter reads 'particular whereof has been rendered to you and are within your knowledge' and just now while giving evidence, you had said the bank has never communicate not even a statement, so how is this statement rendered to the guarantor?

J: My answer is no comment.

**[21]** Further cross-examination showed that though the respondent became aware of the winding up and appointment of liquidator on 3 November 2001, he admitted the respondent did nothing (QA 68). He admitted that the appointment of a liquidator meant the borrower had problems, yet nothing

was done, for example to crystallise the debenture dated 2 December 1996. He confirmed the respondent did not crystallise the debenture (QA 78) even though the respondent was aware of the existence of the liquidator for the borrower in 2001 and provided to the liquidator the redemption amount.

**[22]** There were seven units at Level 3 that were not sold by the liquidator. It was put to the witness (QA 140):

> S: Can you give any evidence whether you have advertise for sale of this property or appoint your estate agent to sell all this property? Can you show the Court a record? I put it to you that the bank didn't do anything at all to this property where the bank has every right under the Power of Attorney.

**[23]** The subsequent questions brought out the fact that the witness, acting for the Respondent and visiting the security, had no idea what the seven units at Level 3 were being used for. He had no idea what the seven units were worth. There were goods and stock. He was not aware what they are worth (QA 159).

**[24]** The foregoing demonstrated to us more than amply that the sum demanded from the appellant does not necessarily reflect with any accuracy the amount owing by the borrower.

THE GUARANTEE

**[25]** By the guarantee, the appellant undertook to pay on demand, inter alia, all moneys which are owing by the borrower or remain unpaid on the general balance of the borrower's account with the respondent anywhere and on any account whatsoever together with interest and although the relation of banker and customer may have ceased. It is stated in cl 2 of the guarantee that all monies from or on account of the borrower and/or from the realisation of any security in reduction of moneys owing by the borrower shall be treated as payments in gross and '… not as appropriated or attributed to any specific part or item of the said moneys … All securities now or at any time held by you shall be treated as securities for the general balance and other amount owing …'.

**[26]** Our first observation is that it is not a blanket authority to demand any sum at will, but in respect of monies owing.

**[27]** That being the case, where there are more than one account, the actual amount owing is determined only if all the accounts the borrower has with the respondent has been consolidated to credit amount to the credit of the borrower in the other account to identify the gross sum owing on the accounts, and crediting the proceeds of all securities realised to reduce the gross amount owing to arrive at the nett amount owed by the borrower. These terms on the

respondent's own form of guarantee which the appellant was persuaded to execute means that the monies owing that can be claimed against the guarantor is the amount after all accounts of the borrower with the respondent are consolidated so as to determine the actual amount owed.

**[28]** We are not unaware that it is provided in cl 7 that:

(a) the respondent to be at liberty but not bound to resort for its own benefit to any other means of payment at any time and in any order as it thinks fit without in consequence diminishing the appellant's liability to the respondent; and

(b) the respondent may enforce the guarantee for the payment:

(i) of the ultimate balance after resorting to other means of payment; or

(ii) for the balance due at any time notwithstanding that other means of payment have not been resorted to and in the latter case, without entitling me/us to any benefit from such other means of payment so long as any money remains due or payable (whether actually or contingently) from the customer to you.

**[29]** In our view, although cl 7 demolishes all argument that the respondent must exhaust all other means of payment before resorting to the appellant as guarantor, it does not negate or exclude the rule to prove the amount that is claimed. Assuming that the demand made was valid, all the respondent had proved was that it was pursuing its claim upon the basis of a notice of demand.

OUR CONCLUSIONS

**[30]** The appellant's defence in this case is not entirely that the respondent should exhaust all his available security first, but the question is whether in the circumstances demonstrated above, the respondent had proved upon a balance of probabilities that the particular sum demanded from the appellant is in fact the sum or at least a part of the sum owed by the borrower. In this case, the appellant had clearly challenged and demonstrated from the respondent's appellant's own witness (PW1) that there was uncertainty as what is the correct amount still owed by the borrower, and therefore there was uncertainty that the amount sought in the notice of demand is the correct amount.

**[31]** Disposal of the 25 units of properties charged to it by the respondent through the liquidator of the borrower is not a matter that the appellant may be concerned about. Though the right to disposal is a right *in rem* in the hands of the respondent, it does not mean the respondent can dispose of it directly only. The evidence shows that the respondent was credited with the redemption

amount. In accepting to release its *in rem* security for disposal by the liquidator, the respondent had willingly allowed the excess, if any, over the redemption amount to be retained by the liquidator to satisfy other creditors. We accept that the respondent is at liberty to be generous with its security. But it is inequitable where that generosity affects the rights of the guarantor, where the respondent's generosity to the liquidator results in the guarantor being exposed to a claim from the respondent for an amount greater than if the respondent had utilised the *in rem* security entirely to reduce the amount owed by the borrower to the respondent. Section 94 of the Contracts Act 1950 provides that:

> A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses or without the consent of the surety, parts with the security, the surety is discharged to the extent of the value of the security.

**[32]** It is not the evidence of the respondent that the redemption sum received is the entire net proceeds from the disposal of the 25 units, and that the liquidator it allowed to auction the properties did not keep any part of the proceeds. But certainly its own evidence that it received only the redemption sum does raise the obvious conclusion the liquidator would be wasting his time to sell the properties without receiving any benefit from the disposal. To that extent the respondent failed to reduce the loss, and s 94 does not allow a claim, see *Kabatasan Timber Extraction Co v Chong Fah Shing* [1969] 2 MLJ 6 (FC).

**[33]** The subject of mitigation of loss provides great scope for argument. But if it remains in the realms of *argumentum ad hominem*, it is of no assistance. The ultimate test of market price is what a buyer is willing to pay in an open sale at the time of purchase. It is also common knowledge that market conditions vary according to economic conditions. It is equally common knowledge that the prices can go up or go down, and it is without notice. Hence, the best point of time a disposal is to be made is anybody's guess. Unless evidence is adduced that proves that the respondent wilfully chose what it knows to be the wrong time to sell, the argument is irrelevant.

**[34]** It was submitted for the appellant that since the guarantee is a demand guarantee, there is a prerequisite for the respondent to serve a valid demand before the cause of action accrues. Counsel relied upon *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610 (SC); *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; [1995] 1 CLJ 609 (CA).

**[35]** It was submitted that since the respondent's pleaded case relied upon a demand made vide its letter dated 8 November 2006 (statement of claim para 8, RR: 307–309), and no evidence was adduced that the demand was duly

served on and received by the appellant because though the notice of demand showed itself to be sent by AR registered post, the respondent failed to produce the AR card duly acknowledged by the appellant. Counsel relied upon *Alliedbank (Malaysia) Bhd v Yau Jiok Hua* [1998] 6 MLJ 1; [1998] 2 CLJ 33 and *Public Bank Bhd v Rasatulin Holdings Sdn Bhd & Ors* [1989] 1 MLJ 47.

**[36]** This part of the appellant's submissions concluded with the submission that the appellant has never in his testimony admitted that he has received the demand letter dated 8 November 2006.

**[37]** In our view, the cases were cited out of context. Evidence of service need only be adduced if the appellant in his statement of defence had contradicted the pleading by the respondent of a demand having been made, in order to address the issue. Civil litigation provides for a statement of claim to give notice of the cause of action and the facts relied upon and a statement of defence as to the facts disputed. Where a fact is disputed in the statement of defence, it is notice that the fact is disputed. Only then does disclosure of the evidence relied arise if required by the statement 'put to strict proof', and for the evidence produced by answers in interrogatories or production if discovery is sought. If the checking and verification by this process satisfies the parties as to what the correct facts were, and come up with agreed facts thereon, there is no necessity for trial upon that disputed fact. If the parties remained not satisfied as to what the correct facts are, then only does it arise for the court to examine the evidence produced through the process of examination and cross-examination, and hear the reasons and explanation by the parties before making its findings on the facts and reaching a decision on the litigation before it. It need not be said that if a fact is not pleaded, the other party did not have the opportunity to check and verify it, and that being so, that fact is unsafe to be admitted into evidence and taken into consideration unless the other party did not object to it and allowed it into evidence.

**[38]** The process of proof in criminal cases differ and is foreign to civil litigation. The reason is that in criminal cases, the burden of proof is beyond reasonable doubt and in civil cases it is upon a balance of probabilities.

**[39]** In this case, the respondent had pleaded that it had sent a letter of demand dated 8 November 2006 and the statement of claim is clear that it is making a claim based upon it. In our view, that is a sufficient pleading. The appellant in his defence attempted to deny any such guarantee, and raised various other grounds, but nowhere is it pleaded that the notice of demand was not served on him or was not received by him.

**[40]** We dismiss this ground of appeal as being wholly without merit.

**[41]** It was also submitted for the appellant that the respondent had failed to establish that a demand was made to the principal borrower. The folly of this argument is that the appellant was required to give a guarantee because he was a director of the borrower. The case for the respondent is based upon the notice of demand to the appellant, and not any irrelevant notice to the borrower. To even begin to mount this argument the appellant should have raised it in his statement of defence. We looked into the statement of defence and found it was not even pleaded that the borrower was not served or did not receive a notice of demand dated the same day 29 June 2001.

**[42]** Counsel for the appellant repeated his references to *Allied Bank (Malaysia) Bhd v Yau Jiok Hua* and *Public Bank Bhd v Rasatulin Holdings Sdn Bhd & Ors*. In our view, the cases were cited irrelevantly. Counsel referred to *Securities For Bankers' Advances* by J Milnes Holden at paras 21–22 that 'if a bank want to call upon a guarantor to pay, it should first address demand to its customer, and, if this is not complied with, the bank should then demand payment from the guarantor ...' and *Bank Security Documents* by JR Lingard that 'Before demand is made on a guarantor, demand must first have been served on the principal debtor within normal banking hours and time allowed for him to meet it. Demand on the guarantor can then be for the sum demanded from the debtor unless the guarantee imposes a lower limit', and submitted in this way:

> The proposition of law by the 2 authors above find its support in The English Court of Appeal judgment by Scrutton LJ in *Bradford Old Bank Ltd v Sutcliffe* (1918) 2 KB 833 at page 848–849 who said that in the situation 'where the debt is not present, but a collateral promise; ... the promise of a surety to pay on demand if his principal does not, appears to me to be collateral promise within the authorities; ... I am of the opinion that the creditor must prove a real demand ...'.

**[43]** Reference to the original passage shows that the above has been edited, obscuring the meaning which provided no support for counsel's submission that a notice of demand must be issued to the borrower also. The submission implies no notice of demand has been issued to the borrower. Checking the record we found that it shows that notice of demand had also been issued to the borrower. We dismiss this part of the submission as wholly without merit.

**[44]** However, the dismissal of the above submissions does not affect our finding earlier above that the respondent had failed to prove that the sum claimed is within the amount owed by the borrower.

**[45]** Accordingly, we allowed the appeal and set aside the order of the High Court with costs. There being no adequate evidence of what is the actual amount owed, and no effort was made in the submissions to show what that amount is, we cannot make any other order.

*Appeal allowed and order of the High Court set aside with costs.*

Reported by Afiq Mohamad Noor